IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.337 OF 2005

Boman R. Kohinoor ... Petitioner.

vs.

1. Nilopher S. Shroff & others. .... Respondents.

Mr.D.D.Madan with Ms.Sunita M. & Rajesh Rathod i/b. N.C.Dalal & co., for Petitioner.

Mr.S.K.Jain,for Respondent nos.1 & 2.

Mr.R.M.Vasudeo, for Respondent no.3.

AND

ARBITRATION PETITION NO.358 OF 2005

Jamshed Ardeshir Maswa. ... Petitioner.

vs.

1. Nilopher S. Shroff & others. .... Respondents.

Mr.R.M.Vasudeo, for Petitioner.

Mr.D.D.Madan with Ms.Sunita M. & Rajesh Rathod i/b. N.C.Dalal & co., for Respondent no.3.

Mr.S.K.Jain,for Respondent nos.1 & 2.

CORAM: D.K.DESHMUKH,J.

DATED: 7th December, 2005

P.C.:-

1. By these two petitions, the same Award made by the sole Arbitrator is challenged. Therefore, both the petitions can be finally heard and disposed off by a common order. In this judgment I am referring the parties as they are described in Arbitration Petition No.337 of 2005 for the sake of convenience. The facts that are relevant and material for deciding these petitions are that the respondent no.1 Nilopher S. Shroff and the respondent No.2 Mr.Rohington Behram Mehta had filed a Civil Suit in the City Civil Court praying for decree of declaration that they are entitled to the share of Rustom Irani in the partnership business carried on in the name and style as "M/s.Bastani & Company" and they are entitled to a share in the profits derived from that business. They also claimed a money decree for the amount that is due and payable to them from 1.1.2000. They also claimed decree of declaration that they are entitled to 2 annas share in a rupee in the estate of Rustom K. Irani in the partnership business of M/s.Bastani & Company and all rights, title and interest therein including the furnitures and fixtures and bank accounts, etc. The plaintiffs had also sought an order for dissolution of the partnership from the date of filing of the suit or from any other date as the Court deems fit and

proper and certain other reliefs were also claimed. By the order made in the suit, the dispute between the parties in the suit were referred to arbitration.

2. It is an admitted position before me that the dispute in these petitions is only in relation to the firm by name M/s.Bastani & company. The partnership business under the name and style as M/s.Bastani & co, first came into existence on 4th February, 1967 between Mr.Rustom Kaikushru Irani, Gushtab S. Behziz, Rustom Khodaram Irani, Beman Rashid Kohinoor, Mehraban Rashid Gorabian, Jamshed Ardeshir Maswa. On 17th April,1970 the partnership was reconstituted because one of the partners by name Rustom Kaikushru Irani sold his share to the other partner by name Gushtab. Mr.Rustom K. Irani continued to be a partner of the firm. In this firm, Mr.Gustab had share of four annas in a rupee, Mr.Rustom had share of two annas in a rupee, Mr.Beman had share of four annas in a rupee, Meheraban had share of three annas in a rupee, Jamshed had share of three annas in a rupee. Mr.Rustom who had share of two annas in a rupee died on 26.11.1975. He left behind him a Will. Admittedly that will has been probated. The said Rustom died leaving behind him, the Widow by name Perin Banoo. It appears that the partnership deed was entered into between the surviving four partners of the firm and Perin Banoo on 23.8.1976. It is stated in that deed that Perin Banoo is admitted as

partner in the place and instead of deceased Rustom and that the business of the firm started from 27.11.1975. It is stated in the partnership deed that it is condition precedent to the admission of Perin Banoo as a partner that her share in the firm shall neither be heritable nor transferable. It appears that Perin Banoo died on 1st January,2000. The respondent nos. 1 and 2 filed the suit claiming to be the heirs of the deceased Rustom. According to them, they become entitled to the share left behind by deceased Rustom in the partnership business on the basis of the Will that was left behind by Rustom. It appears that before the learned Arbitrator, the respondent nos.1 and 2 were also claiming the property on the ground that their mother was the adopted daughter of Rustom and therefore, they inherited the property. The learned Arbitrator has made the Award on 9th June,2005 holding that the respondent nos.1 and 2 are entitled to the share of Rustom in the partnership business of M/s.Bastani and Company on the basis of the Will left behind by Rustom. The learned Arbitrator has negatived the claim of the respondent nos.1 and 2 that they are entitled to the share of Rustom as his legal heirs being the children of the adopted daughter of the deceased Rustom.

3. The learned Counsel appearing for the petitioner in Arbitration Petition no.337 of 2005 submits that the partnership deed dated 17.4.1970 did not provide as to what is to be happen on the

death of a partner, and therefore, in the absence of any contract to the contrary amongst the partners of the firm in terms of Section 42 of the Partnership Act, 1932, the partnership will stand dissolved on the death of Rustom. As per the Will left behind by Mr.Rustom, his wife will inherit the share of Mr.Rustom in the assets and profit of the dissolved firm. The widow of Mr.Rustom on the death of Mr.Rustom decided to enter into partnership with the surviving partners immediately after the death of Mr.Rustom. She took into the partnership firm as her contribution the share of Mr.Rustom in the partnership business which was bequeathed to her. According to the learned Counsel, thus a new partnership came into existence on 23.8.1976 . The consequence of the Will left behind by Mr.Rustom was that the share of Mr.Rustom in the assets and profit of the partnership business became the property absolutely of his widow and therefore, she was entitled to dispose of that property in the way she desires to do. While entering into the partnership, she agreed that her share in the partnership is neither heritable nor transferable. She also agreed that her share can be transferred by her at the stated price to one of the partners of the firm. In the submission of the learned Counsel therefore, the disposal or devolution of the share of Perin Banoo in 1976's partnership firm will be governed by the recitals in that deed and not according to the recitals in the Will left behind by Mr.Rustom. The learned Counsel submits that in terms of the said Will on the death

of Mr.Rustom, his widow became the sole and absolute owner of the property and there is no recital in the Will that she has only life interest in the Estate in the sense that her power of disposing of the property is restricted. According to the learned Counsel, the basic premise of the Award impugned in the petition is that on the death of Mr.Rustom in the property left behind by Mr.Rustom, his widow gets only limited interest in the property during her life time. The learned Counsel submits that there is no recital in the Will which places restriction on the power of the widow to dispose of the property if she wants during her life time and therefore, in the absence of any restriction placed by the Will on her power to dispose of the property and therefore, the estate bequeathed to her cannot be termed as life estate. In the submission of the learned Counsel as the very foundation of the Award impugned in the petition is wrong, the entire Award is liable to be set aside. The learned Counsel submits that according to the Will left behind by Mr.Rustom so far as the share of Mr.Rustom in M/s.Bastani and Company is concerned, it goes to his widow with no provisions in the Will restricting her power to dispose of that share and therefore, according to the learned Counsel the learned Arbitrator was not at all justified in terming the estate inherited by Perim Banoo as a life estate. The learned Counsel submits that the learned Arbitrator has noted the arguments made on behalf of the petitioner that on the death of Mr.Rustom, the firm stands dissolved,

but the learned Arbitrator has not decided that. It is submitted that as a consequence of dissolution of the firm, Perim Banoo became entitled to receive the share of Mr.Rustom. She was also entitled to enter into another firm taking with her the share of Mr.Rustom which she had received. It is submitted that the learned Arbitrator has totally ignored this relevant aspect, therefore, the Award suffers from violation of principles of natural justice.

4. The learned Counsel appearing for the petitioner in Arbitration petition no.358 of 2005 submits that it was one of the contentions raised by the petitioner in Arbitration petition no.358 of 2005 that the claim made by respondent nos. 1 and 2 is barred by Law of Limitation. It was contended that the suit of the respondent nos.1 and 2 was for the accounts and share of the partnership of which Mr.Rustom was the partner. The cause of action for instituting that suit would arise on the death of Mr.Rustom, therefore, executors of the Will of Mr.Rustom could have filed the suit for that relief within three years from the date of the death of Mr.Rustom. No such suit was filed therefore, the respondent nos. 1 and 2 would not be entitled to institute the suit for that relief. The learned Counsel submits that though this submission has been noted by the learned Arbitrator in the Award, it has nowhere been decided by the learned Arbitrator. The learned Counsel submits that for the purpose of granting relief to the

respondent nos. 1 and 2, the learned Arbitrator has not only entertained their claim for accounts of the firm which was dissolved in the year 1975, but also the learned Arbitrator has declared the clauses in partnership deed of the year 1976 as being contrary to the Will in an action brought in the year 2001. In the submission of the learned Counsel, it was totally impresumable.

5. The learned Counsel appearing for respondent nos.1 and 2 on the other hand submits that according to the Will left behind by Mr.Rustom, his share went to his window Perin Banoo to be held by her during her life time. According to the learned Counsel the partnership deed of the year 1976 shows that the Widow was taken as partner in the place of deceased Rustom and therefore, the old partnership business of which Mr.Rustom was the partner continued now with his widow as a partner. According to the learned Counsel in terms of the Will on death of Widow, respondent nos.1 and 2 were entitled to the share left behind by Mr.Rustom. According to the learned Counsel therefore, the learned Arbitrator was perfectly justified in holding that the respondent nos. 1 and 2 were entitled to the share of the deceased Rustom in the partnership firm. The learned Counsel submits that even in the returns filed by the partners of the firm after 1976 it is clear that the old partnership continued and the widow was merely introduced as a partner in the place of deceased

partner. None of the partners ever treated the firm that was brought into existence in the year 1970 as dissolved in the year 1976. Therefore, according to the learned Counsel as the firm continued and as according to the Will the Widow was merely entitled to enjoy the share of the deceased Rustom during her life time, on her death the respondents will inherit the share. The learned Counsel further submits that on the true construction of the Will, it is clear that what was given to the Widow was only the life estate and she was not to become the absolute owner of the property and therefore, the learned Arbitrator was perfectly justified in declaring that certain clauses in the 1976's Partnership Deed are contrary to the Will.

6. So far as the submission that objection to the maintainability of the claim as barred by the Law of Limitation, not having been decided by the learned Arbitrator is concerned, the learned Counsel submits that as that objection has not been decided by the learned Arbitrator, order under Section 34(4) of the Arbitration and Conciliation Act,1996 can be made so that the objection can be decided by the learned Arbitrator.

7. Now if in the light of these rival submission, record of the case is perused, it becomes clear that entire case turns on the construction that is to be placed on the Will left behind by deceased

Rustom. For the present purpose the paragraph nos.4, 5, 6, 7 and 8 of the Will are relevant. They read as under:-

> "(4) My total estate consists of (a) 2 annas share in Bastani & Co. Dhobi Talao, (b) 4 annas share in Firdosi & Co. Restaurant, Parel T.T., (c) 88 shares of Tata Steel and (d) Flat No.25 on 3rd floor in Baimai building occupied by me as a monthly tenant and household articles lying in the said flat and shown in the Schedule hereto belong to me absolutely.
>
> (5) I direct that after obtaining Probate my executors shall receive my estate and pay the income thereof to my wife Perin Banoo Rustom Sadakat (nee Tirandaz) during her lifetime and after her death my trustees shall pay every month a sum of Rs.125/- to my adopted daughter Ketty wife of Behram Dinshaw Mehta for the maintenance of herself and the maintenance, education etc. for her monor son Rohinton and her minor daughter Niloufar. However, in case the said Ketty remarries the said sum of Rs.125/- should be spent by my trustees for the education and maintenance of the

said Rohinton and the said Niloufar until they attain majority.

(6) I direct that from my income of the partnership business mentioned in clause 4 above all expenses such as the payment of pending bills, debts, death-bed charges, estate duty, Probate duty and all legal expenses pertaining thereto and all other costs, charges and expenses incurred in the execution of this my Will should first be met and paid off out of my estate.

(7) My wife the said Perin shall be entitled to the said income absolutely during her lifetime.

(8) I give, devise and bequeath the balance of my estate left over after meeting all expenses shown above in para 6 above after Perin Banoo's death to the aid Rohinton and the said Niloufar in equal shares."

Perusal of paragraph 4(a) quoted above shows that the share of the deceased Rustom in M/s.Bastani & Company is described in paragraph 4(a) i.e. 2 annas share in the firm by name Bastani & Co.. Perusal of paragraph (5) shows that the paragraph deals with what is to be done with the income that is received from the property which is described

in paragraph 4. Paragraph 6 deals with the amounts to be paid off from the Income derived from the properties described in paragraph 4 (a) and 4(b). It implies that the outstanding debts of the deceased should be first paid out of the income derived from the estate described in paragraph 4(a) and 4(b). Then paragraph 7 which is in my opinion is the most important paragraph states that the widow will be entitled to the income from the properties described at paragraph 4(a) and 4(b) absolutely during her lifetime. It is thus clear that during her lifetime the Widow became the absolute owner of the estate which is described in paragraph 4(a) and 4(b). Then paragraph 8 recites that the balance of the estate left behind by the deceased shall go to respondent nos.1 and 2 on the death of the Widow. It means that the estate left behind by the deceased of which the Widow became the absolute owner after the death of the deceased will go to respondent nos.1 and 2 if during her lifetime that estate is not disposed of by the widow. In order to term the Estate and the property received by the Widow under the Will to be a life estate one will have to find a specific clause in the Will restricting her power to dispose of that estate in the manner she likes during her life time. One does not find any recital in the Will which places any restriction on the power of the Widow to dispose of the property that she gets under the Will during her lifetime. Therefore, in my opinion, the learned Counsel appearing for the petitioner is right in submitting that the basic premise of the Award

that the estate which the Widow got under the Will is a life estate, is not well founded considering the recitals in the Will.

8. It is clear from the partnership deed of the year 1970 that there was no agreement between the partners on the point of dissolution of the firm. Therefore, by operation of Section 42 of the Partnership Act,1932, the consequence of death of Mr.Rustom would be that the firm will stand dissolved and in terms of his Will his Widow will inherit his share in the business and assets of the dissolved firm. It appears that the widow decided to enter into a new partnership deed dated 23.8.1976. Perusal of that partnership deed shows that in that partnership deed itself it is stated that one of the reasons why the partnership deed is reduced to writing is that on 26.11.1975 Mr.Rustom has died and the surviving partners have decided to admit his widow as partner. This recital if read with Section 42 of the Partnership Act, makes it clear that the surviving partners of the partnership firm had treated the firm as dissolved on 27.11.1975 and they were entering into the agreement with the Widow of the deceased partner to form a new partnership with effect from 27.11.1975 and the consideration for admitting the Widow as a partner in this new partnership firm was that she was to contribute the share of her husband inherited by her in the assets of the firm. The recitals in the partnership deed of 1976 that the business of the firm has started with effect from 27.11.1975 i.e. the next

day after the death of Rustom shows the clear intention of the partners that the partnership of the year 1976 is a new partnership and it is not the continuation of the old partnership firm. There is a clear recital in the partnership deed that the partnership has commenced with effect from 27.11.1975 and is continued from the said date. Thus, in my opinion this recital in the partnership deed completely belies the theory that 1976's partnership was the continuation of the old partnership. Therefore, in my opinion, in view of the clear provisions of Section 42 of the Partnership Act, even if recitals in the deed of partnership were otherwise, the consequence in Law would be the same, and therefore, it was not possible for the partners to continue the firm. In my opinion, once one reaches this finding that in the year 1976 a new firm came into existence then it is not necessary to consider anything else, because if in the year 1976 a new firm came into existence then respondent nos. 1 and 2 would not be entitled to claim anything from the assets and profits of that firm. So far as the share of Widow is concerned, there are clear recitals in the partnership deed that her share is not heritable and is also not transferable and the transfer of that share will be governed by clause (7) of the 1976's Partnership Deed. Clause 7 of that 1976's partnership deed reads as under:-

> “7. As a condition precedent to the

> admission of Perin Banoo as a partner in the firm, it was agreed by Perin Banoo that her share in the firm shall neither be heritable nor transferable. If Perin Banoo desires to sell her share during her life time, she shall offer it for sale and sell it only to their partners of the firm or any of them for a fixed amount of Rs.25,000/-. If they are not ready and willing to purchase it, then the firm shall stand dissolved. If Perin Banoo continues to be a partner in the firm till her death, then her legal representatives shall sell her share for a sum of Rs.25,000/- to the two working partners of the firm or any one or more of them. If the then partners of the firm or any of them are not ready and willing to purchase the said entire share, then the firm shall stand dissolved."

Therefore, in order to claim any share in the assets and the business of this 1976's firm, the respondent nos. 1 and 2 will have to first challenge the validity of clause (7) of the 1976's partnership deed. I have not been shown that at any point of time the validity of that clause has been challenged by the respondent nos. 1 and 2. In any case challenge to the validity of the clause could have been raised immediately after

that partnership was entered into and not after the death of the Widow, because what will have to be challenged is the power of the widow to enter into such a clause and that will have to be done during her life time and not after her death. Thus looking from any point of view, the findings that have been recorded by the learned Arbitrator cannot be termed as possible findings. It is clear to my mind that the learned Arbitrator has ignored the relevant law which has to be applied i.e. Section 42 of the Partnership Act in deciding the issue involved in the dispute before the Arbitrator.

9. One more clear infirmity in the Award is that the contention of the petitioner in the Arbitration Petition no.358 of 2005 that the suit for accounts of the firm of which Mr.Rustom was the partner is barred by the Law of Limitation, has not been at all considered. So far as the request made by the learned Counsel appearing for respondents that for consideration of the point of limitation, order under Section 34(4) of the Arbitration Act should be made is concerned, in my opinion, in view of the finding that the basic premise on which the Award is based is wrong, making of order under sub-section (4) of Section 34 of the Act only for consideration of question of limitation will not serve any purpose. In the result therefore, both the petitions succeed. The Award impugned in both the petitions is set aside. The respondent nos. 1 and 2 in the

Arbitration petition no.337 of 2005 are directed to pay costs of both the petitions to the petitioners as incurred by them.